No. 15-7250

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In The Supreme Court of the United States

MARCELO MANRIQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

Petitioner filed a notice of appeal directed to his final judgment and sentence. That filing invoked the Court of Appeals' jurisdiction, which remained extant when the district court filled in the blanks of the restitution portion of his sentence. Under the Federal Rules of Appellate Procedure, a single notice of appeal perfects an appeal of a trial court's judgment and sentence including restitution, even if the specifics of restitution are deferred as allowed by statute and *Dolan v. United States*, 560 U.S. 605 (2010).

The government disagrees, arguing that two (or conceivably more) notices of appeal are required. The government's interpretation does not accord with the Federal Rules of Appellate Procedure.

A. Fed. R. App. P. 3(a) and 4(b) govern the means to perfect an appeal of an amended judgment specifying restitution.

The time for perfecting a criminal appeal is "rule-based," not "statute-based" as in civil cases. *Bowles v. Russell*, 551 U.S. 205, 212 (2007).

1. Petitioner satisfied the Rule-based temporal limits for perfecting a criminal appeal.

Fed. R. App. P. 3(a)(1) requires that an appeal of right be initiated by the filing of a notice of appeal with the district court within the time allowed by Rule 4,

here 14 days, in the form required by Fed. R. App. P. 3(c)(1). Those requirements were met in this case, as they are in any case involving deferred restitution under the Mandatory Victims Restitution Act and the procedure approved in *Dolan*.

Here, the district court announced its judgment and sentence on June 24, 2014, including mandatory but unspecified restitution:

> THE COURT: [R]estitution is mandatory. . . . It is further ordered that . . the victim's losses are not yet ascertainable; therefore, the court will set a date [within 90 days] for the final determination of the victim's losses.

JA:27. That oral pronouncement was followed by a final judgment, which deferred restitution until August 22, 2014, and stated that an amended judgment will be entered after such determination. The incomplete judgment left blank the restitution boxes entitled "Name of Payee," "Total Loss," "Restitution Ordered," and "Priority or Percentage." JA:39.[1]

Petitioner complied with Rule 3(a) & (c) by timely filing a notice of appeal on July 8, 2014, designating his name as appellant, that the appeal was from the "final judgment and sentence entered in this action on the 24th of June, 2014," and it was taken to the United

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[1] The government focuses not on the blanks and caveat, but rather on the placeholder restitution amount of $0.00. It is unreasonable to construe the June 24th judgment as a final judgment awarding $0.00 restitution.

States Court of Appeals for the Eleventh Circuit. DE:42. He thus satisfied Rule 3's requirements for invoking the Court of Appeals' jurisdiction. Within 90 days of the original sentencing – while the appeal was pending, but before any briefing had taken place – the district judge entered an amended judgment filling in the empty blanks and noting that the amended judgment modified only the restitution ordered. DE:66,74. The government's brief in the Court of Appeals accurately characterized the amended judgment as "adding the order of restitution to the original judgment." *See* Gov't Br. CA 2, *United States v. Manrique*, 618 F. App'x 579 (11th Cir. 2015) (No. 14-13029).

That characterization is reinforced because the district court did not again advise Petitioner of his right to appeal after specifying the amount of restitution, as Fed. R. Crim. P. 32(j)(1)(B) would require following a sentencing. The absence of Rule 32's required advisory signals that the district court knew that the sentence was already on appeal awaiting filled-in blanks. The court knew the restitution award would be challenged on appeal, commenting, "I don't know the right answer to this. I hope that the Eleventh [C]ircuit will give me some guidance on this. " JA:61. If the district court believed the appeal had not yet been perfected, Rule 32(j)(1)(B) required a new advisory "after sentencing" because there was no reason to believe Petitioner was aware he needed to file a second notice in his pending appeal. The government interprets the absence of an advisory as demonstrating Petitioner already knew of his right to appeal, relying on *Peguero v.*

United States, 526 U.S. 23 (1999). *See* Br. 28 n.7. But unlike in *Peguero*, the events of record show all too clearly that Petitioner was unaware of any such requirement.

The district court's two-step process for entering a judgment conforms to the procedure this Court outlined in *Dolan*: "[T]he statute before us itself provides adequate authority to do what the sentencing judge did here – essentially fill in an amount related blank in a judgment that made clear restitution was applicable." 560 U.S. at 620.

The question is not, therefore, whether the Court of Appeals' jurisdiction was invoked. It was. The question is whether a second notice of appeal was necessary to invoke it again. Three circuits have held that a single notice of appeal suffices, but the government does not address any of those decisions: *United States v. Cheal*, 389 F.3d 35 (1st Cir. 2004); *United States v. Ryan*, 806 F.3d 691, 692 (2d Cir. 2015); *Hyde v. United States*, 556 F. App'x 62, 63 n.1 (2d Cir. 2014); *United States v. Stoian*, 2015 WL 5036366 (6th Cir. Aug. 12, 2015); *United States v. Malcolm*, 114 F.3d 1190 (table), 1997 WL 311416 at *6 (6th Cir. 1997). After the government filed its brief, the Second Circuit reiterated these decisions in *United States v. Goldberg*, ___ F. App'x ___, 2016 WL 4626552 at *1 n.1 (2d Cir. Sept. 6, 2016) ("Goldberg's notice of appeal was premature as to restitution because the final restitution order was not entered until July 2, 2015. Nevertheless, in accordance with Federal Rule of Appellate Procedure 4(b)(2), Goldberg's notice of appeal was deemed effective upon

entry of the July 2, 2015 order. *See* Fed. R. App. P. 4(b)(2).").

Those circuit decisions apply the savings clause of Fed. R. App. P. 4(b)(2) to perfect the appeal of the truly final judgment and sentence. The savings clause states:

> **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a sentence – but before entry of the judgment or order – is treated as filed on the date of and after entry.

Id. The phrase "the judgment" in Rule 4(b)(2) refers to the truly final judgment with its blanks filled in. Whether one characterizes it as the government did below, as "adding the order of restitution to the original judgment"; or as the Court did in *Dolan*, as "fill[ing] in an amount related blank in a judgment that made clear that restitution was 'applicable,'" 560 U.S. at 618 – the effect is the same. The one and only judgment is the completed final judgment. Once the final judgment is completed, the previously-filed notice of appeal matures automatically by virtue of Rule 4(b)(2). Here, the notice matured to perfect appeal of the completed June 24th judgment.

The government disagrees, contending that the trial court's sentence on June 24th was a final decision as to conviction and incarceration, but not as to restitution, because further restitution proceedings were yet to occur; the notice of appeal preceded the restitution hearing and order detailing restitution.

Consequently, the government argues, the notice of appeal cannot mature to cover the finalized judgment. "Putting the horse (the sentence) before the cart (the notice of appeal) helps prevent unnecessary and frivolous appeals." Br. 11. The government's premises and analogy have been rejected by the Court in both civil and criminal appeals.

It is incorrect to say, as the government does, that one cannot notice an appeal before knowing the basis for appeal. In the typical cold-record criminal appeal, for example, new counsel is first appointed for appeal. The newly-appointed lawyer rarely knows any bases for appeal before reviewing the record and transcripts that are prepared much later. *See Anders v. California*, 386 U.S. 738 (1967). Criminal defense counsel must nevertheless notice an appeal, if the client requests one, whether meritorious issues are apparent or not. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (citing *Rodriquez v. United States*, 395 U.S. 327 (1969) and *Peguero*, 526 U.S. at 28 (noting that defendant requesting appeal is entitled to appeal without showing issues of merit)). As a practical matter, identification of appellate issues by counsel, and disclosure of those issues to opposing parties, both occur for the first time in the initial brief. *See* Pet. Br. 26-27.

The government claims that the savings clause cannot perfect a notice of appeal filed before the trial court fully specifies its final decision. But this is contrary to this Court's decisions holding that a notice of appeal may be filed while an otherwise final judgment is incomplete or provisional. Those decisions include

one relied upon by the government in its own argument, *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269 (1991). *See* Br. 17-18. Indeed, *FirsTier* supports Petitioner's position that a notice of appeal filed after an incomplete order later matures to perfect its appeal.

FirsTier addressed Fed. R. App. P. 4(a)(2), the civil appeal counterpart of Rule 4(b)(2). FirsTier noticed a civil appeal after the district court announced from the bench it intended to grant summary judgment for the respondent, but before entry of judgment and before the court made any findings of fact or law. Proposed findings had not yet been submitted, as the district court requested. The question presented was "whether the bench ruling is a 'decision' under Fed. R. App. P. 4(a)(2)." The general bench announcement in *FirsTier* was much like the district court's general announcement at sentencing here, that restitution is mandatory. The appellee maintained, much as the government does here, "for a ruling to be final, it must end the litigation on the merits, and the judge must clearly declare his intention in this respect." *Id.* (citations, alterations and internal quotations omitted). Appellee argued, further, that the judge did not terminate the litigation and that he did not explicitly exclude the possibility that he might change his mind in the interim. *Id.*

FirsTier noted the rationale for the savings clause of Rule 4(a)(2): "[U]nlike a tardy notice of appeal, certain premature notices of appeal do not prejudice the appellee and [] the technical defect of prematurity

therefore should not be allowed to extinguish an otherwise proper appeal." 498 U.S. at 651. With that understanding, the Court held that FirsTier's early notice did not come too early to perfect its plenary appeal: "[W]e conclude that Rule 4(a)(2) permits a notice of appeal to be filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." 489 U.S. at 652 & n.4.

The Court has ruled similarly as to provisional or interim sentences in criminal cases. Both *Corey v. United States*, 375 U.S. 169 (1963) and *United States v. Behrens*, 375 U.S. 162 (1963) considered 18 U.S.C. §4208(b), which permitted the district court to announce a provisional sentence and commitment, subject to a later final sentencing hearing. The purpose of the provisional sentence and commitment was to permit the Bureau of Prisons to conduct a study and make further recommendations about an appropriate final sentence. Following the study and recommendation, which could take up to six months, a final sentence was entered following a full sentencing hearing. *Corey* held that the provisional sentence had sufficient finality for purposes of appeal, even if it was not truly final. The Court noted that if the final modification of the sentence occurred while the case was on appeal, "only the final sentence which was later imposed" would still have been open to review on appeal. 375 U.S. at 174 n.15.

Behrens amplified *Corey*'s analysis: "The whole point of using [the provisional sentencing law] is, in its own language, to get 'more detailed information

as a basis for determining the sentence to be imposed * * * '" *Behrens*, 375 U.S. at 165 (quoting §4208(b)). The studies and reports "assist the judge in making up his mind as to what the final sentence shall be." *Id.* Those reasons for a provisional sentence mirror the reasons for a provisional final judgment in a case with deferred restitution. Significantly, *Behrens* concluded that the post-study sentencing hearing is the actual sentencing hearing, at which both the defendant and counsel must be present. *Id.* Although the hearing and actual sentence follow the notice of appeal, the first notice of appeal perfects the finalized judgment as well. *See Corey*, 375 U.S. at 174 n.15. The cart (the notice of appeal) may indeed precede the horse (the sentence). *See Behrens*, 375 U.S. at 165.

Finality is contextual, particularly the meaning of final judgment in deferred restitution appeals. *See United States v. Tulsiram*, 815 F.3d 114 (2d Cir. 2016) (acknowledging anomaly in deferred restitution cases because appealability precedes true finality of the judgment) (citing *Clay v. United States*, 537 U.S. 522, 527 (2003) ("[L]ike many legal terms," the meaning of final "depends on context.")); *see, also*, *United States v. Gilbert*, 807 F.3d 1197, 1200 (9th Cir. 2015) (citing other circuit decisions to the same effect, including *Cheal*, 389 F.3d at 51-52; *Gonzalez v. United States*, 792 F.3d 232, 237 (2d Cir. 2015); and *United States v. Muzio*, 757 F.3d 1243, 1250 (11th Cir. 2014)).

Each of these decisions implicitly accepts the observation of the *Restatement* that "final judgment" is not perfectly coterminous with "final enough to

appeal." *Restatement (Second) of Judgments* §13, Comment *b* (1980). In fact, this Court explicitly relied on the treatise's Comment *b* in its own discussion of the meaning of finality in federal criminal judgments on appeal. *See Clay*, 537 U.S. at 527. Comment *b* explains that the traditional meaning of what constitutes a final judgment has been altered by the allowance of appeals of final judgments before a judgment is truly final because, for example, the "amount of damages, or the form or scope of other relief, remains to be determined." Comment *b*. The government's brief claims that the *Restatement*'s commentary speaks to *res judicata* and interlocutory appeals. Br. 18-19 n.2. But the comment's observation is couched "in the context of statutes providing for appellate review of 'final decisions' (as in 28 U.S.C. §1291, 'Final decisions of district courts')." *Id.* And that was the context in which this Court viewed it in *Clay*.

Thus, a notice of appeal satisfies Rules 3(a)(1) and 4(b)(1) & (2), even if the details of restitution are yet to be filled in at the time the notice is filed. It satisfies Rule 3(a)(1) even if it is filed before the underlying proceedings have ended. It also satisfies Rule 4(b)(2)'s savings clause because it was filed "after the court announces a decision, sentence, or order – but before the entry of the judgment or order." That is what occurred here. An oral announcement was made ordering unspecified restitution, followed by a provisional judgment. Then an amended judgment specifying restitution was entered, "adding the order of restitution to the original judgment." *See* Gov't CA Br. 2. Upon entry of

the fill-in-the-blanks amended judgment, the original provisional judgment became "the judgment," referenced by Rule 4(b)(2) and the notice of appeal matured to perfect it.

2. 18 U.S.C. §3742 does not override the Rule-based temporal limits for perfecting an appeal of restitution.

To defend the Eleventh Circuit's jurisdictional holding below, the government disregards *Bowles*, arguing instead that the temporal requirements for perfecting a criminal appeal are based on statute, 18 U.S.C. §3742(a). Br. 10. This argument reads too much into §3742, which was adopted to enlarge the cognizable grounds for sentencing appeals and to authorize government appeals of sentences.

The government argues that §3742(a) specifies "the means by which appellate review may be obtained" because it states, "A defendant may file a notice of appeal . for review of an otherwise final sentence." Br. 9-11. The government extrapolates this general permissive language into a new temporal jurisdictional limitation on restitution appeals. *Id.* To the contrary, 28 U.S.C. §1291 has been, and continues to be, the jurisdictional basis for appealing a final judgment and sentence imposing restitution. And the temporal limits for such appeals have been, and continue to be, Rule-based under the Federal Rules of Appellate Procedure. Section 3742 simply supplements §1291 by enlarging the *cognizable grounds* for sentencing appeals

and by authorizing *government appeals*, both of which had previously been limited.

Indeed, if it were otherwise, the §3742 language cited by the government would override the Rules. This Court rejected a similar claim that the statute intended to change appellate procedures without specifically doing so. *See Greenlaw v. United States*, 554 U.S. 237, 251 (2008) ("We therefore see no reason to read the current statute [3742] in the inventive manner amicus proposes, inferring so much from so little."). Instead, the Court has assumed that Congress adopted §3742 aware of prior appellate practice, and intending it to operate in harmony with existing law. *Id.* at 250-51. *Greenlaw*'s conclusion applies here, as well.

Section 3742 was adopted as part of the Sentencing Reform Act of 1984 (effective 1987), an implementation of the federal Sentencing Guidelines. Section 3742 does not mention restitution, although it does specifically enumerate other aspects of a sentence – "fine, or term of imprisonment, probation, or supervised release." Clearly, §3742 did not alter the jurisdictional temporal limits to perfect an appeal, and particularly not appeals of the restitution portion of a criminal sentence.

Restitution sentences were imposed long before §3742 and the Sentencing Guidelines were adopted, under the provisions of the Victim and Witness Protection Act of 1982, and its predecessor, the Federal

Probation Act of 1925.[2] Such restitution sentences have long been appealable as a final decision under 28 U.S.C. §1291, which grants courts of appeals jurisdiction over "all final decisions" of the district courts. *See, e.g.*, *United States v. Palma*, 760 F.2d 475, 476 (3d Cir. 1985) (holding court of appeals had jurisdiction under §1291 to entertain appeal "from the sentence to the extent it orders restitution pursuant to the VWPA"); *United States v. Keith*, 754 F.2d 1388, 1390 (9th Cir. 1985) (same).

Decisions cited by the government do not say otherwise. Both *Koon v. United States*, 518 U.S. 81 (1996) and *United States v. Ruiz*, 536 U.S. 622 (2002) noted that §3742 altered the Court's prior jurisprudence limiting cognizable grounds for appellate review of *incarceration* sentences. Restitution was not at issue in either case. And neither were the temporal requirements for such appeals.

Section 3742's silence as to restitution evinces congressional intent that pre-existing statutory jurisdiction for appellate review of restitution, and the manner of review, were not to be changed by that new legislation. This silence signals no change to the existing jurisdictional grant, or caselaw interpreting it. *Greenlaw*, 554 U.S. at 250 (citing *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.")).

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[2] Codified at 18 U.S.C. §§3651-3656 (repealed November 1, 1987).

Despite the adoption of §3742, the basis for jurisdiction over a restitution award continues to be set forth in §1291, which allots to the Courts of Appeals jurisdiction over "all final decisions." The manner of implementation of appellate review under §1291 remains under Federal Rules of Appellate Procedure 3 and 4(b). *See Bowles*, 551 U.S. at 212; *United States v. Lopez*, 562 F.3d 1309, 1312-13 (11th Cir. 2009).

3. Neighboring rules confirm that Petitioner perfected the temporal limits to appeal his restitution sentence.

Rule 4(a), governing civil appeals, specifies that additional notices of appeal are required to perfect appeal of "a judgment altered or amended." Rule 4(a)(4)(B)(iii). That requirement is absent from Rule 4(b), governing criminal appeals. The government gives short shrift to this contrast. Br. 22 n.3. But it is telling.

Instead, the government focuses on Rule 4(b)(3), a neighboring criminal appeal provision entitled "Effect of a Motion on a Notice of Appeal," arguing that its silence as to notices of appeal for amended restitution judgments implies that multiple notices of appeal are required. But under this view, the rules drafters wrote explicit rules for civil appellants, yet only by inference for criminal appellants – explicitly designating that civil appellants must file multiple notices within a single appeal (and waiving additional filing fees), while intending for criminal appellants to infer those same

requirements from the lack of explicit rules (and requiring criminal appellants to pay additional fees not required of their civil litigant counterparts). This is an unreasonable interpretation of the rules, especially since the drafters rewrote these provisions to eliminate traps for unsuspecting litigants. *See* Fed. R. App. P. 4(a), advisory committee's note (1993 amendment).

Furthermore, the neighboring rule on which the government relies relates to other matters altogether. Fed. R. App. P. 4(b)(3) covers three specific tolling motions having nothing to do with restitution. Unlike those freestanding motions, which *challenge* the final judgment and sentence, the restitution proceeding is not based on a defense motion – certainly not one challenging a final judgment. The district court's proceeding is simply a continuation of sentencing without further motions or pleading. Rule 4(b)(3) has neither explicit application to, nor does it offer relevant inferences about, the requirements to perfect appeal of a restitution sentence.

B. Petitioner's interpretation, which is employed in at least three circuits, avoids the significant adverse practical consequences of the government's approach.

1. Splintering a sentence into separate "decisions," as the government contends, causes significant adverse practical consequences.

The government's interpretation splinters a sentence into separate "decisions," then argues that a new notice of appeal is required each time the district court enters a deferred order or judgment of restitution. This interpretation has severe adverse practical consequences in deferred restitution cases.

The Mandatory Victims Restitution Act allots restitution to every identifiable victim suffering a pecuniary loss, which includes vast crimes such as fraud. *See* 18 U.S.C. §3663A(c)(1)(B). If conducted *seriatim*, the potential number of restitution hearings, orders, amended judgments and consequent appellate cases could easily number in the dozens, hundreds, or even thousands. Under the government's interpretation, a criminal defendant has to file separate notices of appeal for each (with separate filing fees), each creating a new appeal (subject to consolidation) in order to perfect a single appeal of the restitution award contained in the last amended judgment. The government's view is entirely inconsistent with the Rules' overriding principle that they are to be interpreted "to secure simplicity in procedure and fairness in administration, and to

eliminate unjustifiable expense and delay." Fed. R. Crim. P. 2; *see* Fed. R. App. P. 1(a)(2).

Additionally, the government's approach undermines the certainty of time limits for collateral review under 28 U.S.C. §2255. *See, e.g.*, *United States v. Barry*, 647 F. App'x 519 (6th Cir. 2016) (§2255 motion is appropriate forum to address ineffective assistance of counsel regarding restitution). If the final judgment and later-entered amended judgment(s) are different final judgments, as the government contends, their different dates of entry give rise to different deadlines to file for collateral review. *See* 28 U.S.C. §2255(f)(1). If neither the original judgment nor amended judgment(s) is appealed, §2255 petitions are due within a year (and 14 days) after their respective entry dates – different dates, often months apart. If one is appealed, but not the other(s), one is due when the appeal ends (plus 90 days if no certiorari petition is filed), but the other(s) is due based on the date it was originally entered – a date that may be before or after the appeal ends. If both are appealed unsuccessfully, but a petition for writ of certiorari is filed as to the issues in only one judgment, the due dates run from the date the appeal ends for one, but as of the date certiorari proceeding ends as to the other – usually months apart. This complicated consequence only results from the government's novel view that there are multiple final judgments in deferred restitution cases. Current jurisprudence, however, rejects this multiple due-date approach, implicitly rejecting the government's reading of multiple final judgments. *See United States v.*

Gilbert, 807 F.3d at 1201 ("one-year statute of limitations to file a §2255 motion does not restart when the specific amount of restitution is later entered").

These adverse consequences counsel against the government's proposed interpretation.

2. Petitioner's interpretation, embraced by the majority of circuits, has caused no adverse consequences.

Even though Petitioner's contrary interpretation has vitality in at least three circuits, the government questions its practicality. The government's brief invokes three rhetorical questions to suggest that Petitioner's reading is uncertain and interferes with rights of cross-appeal. Br. 25-26 & n.6.

First, the government inquires: What happens if the appeal of the original judgment has been resolved by the time the amended judgment specifying restitution is entered? This question is not unique to restitution appeals, for it applies to any application of the savings clauses in both civil and criminal appeals. Yet, the government is unable to identify a single instance in which its hypothetical has arisen, even in circuits that apply the savings clause to deferred restitution appeals. One may fairly conclude that it does not happen, and the reason is that the parties and courts of appeals are aware that the restitution question remains unresolved – the provisional final judgment says so – so the appellate court does not enter judgment before the restitution issues are resolved. Should

a district court refuse to complete its restitution task, this Court has advised that it is subject to mandamus. *See Dolan*, 560 U.S. at 617. Thus, even in the extreme cases identified by the government, including intervals as long as five years, Br. at 23 n.4, the courts of appeals have not resolved an appeal without deciding the restitution issue.[3] If, however, a court of appeals does enter its judgment and mandate before entry of the amended restitution judgment, its appellate jurisdiction would end, requiring a party to use the second option described in *Dolan* by appealing it separately.

Second, the government asks a hypothetical question based on its own convenience, a convenience not authorized by the rules: What happens "if the government believes a restitution award is too low but nevertheless declines to challenge it on appeal–unless the defendant does so first, in which case the government would consider a cross-appeal," but by the time of briefing a notice of appeal is too late? *Id.* This hypothetical is also not unique to deferred restitution appeals. The dilemma occurs in any appeal involving restitution,

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[3] The median length of a criminal appeal is 10.6 months, not 8.5 months as the government mistakenly asserts. *See* Br. 23-24. The government incorrectly cites Table B-4, instead of Table B-4A, of the Federal Judiciary's Annual Report for 2015. The pertinent information for "criminal appeals" is contained on page 2 of Table B-4A (http://www.uscourts.gov/file/19493/download). The table erroneously cited by the government includes all civil and criminal appeals, original proceedings, and miscellaneous applications. Table B-4 Note. Applications to file second or successive §2255 petitions skew the duration downward because they must be determined within 30 days. *See* 28 U.S.C. §§2255(h) & 2244(b)(3)(D).

even if not deferred, because briefing is the first time that the restitution issue need be mentioned. The answer is dictated by the rules, which afford the government no special luxury to sit and wait: It must file a timely notice of appeal or cross-appeal whenever it intends to appeal, whether the defendant enters an appeal or not – always subject to a voluntary dismissal, if that is its choice, after seeing its adversary's legal position on appeal.[4] If the government has not appealed at the outset, it may still do so after entry of the amended judgment. *See Gonzalez*, 792 F.3d at 237 (holding that there is a second opportunity to appeal after the final order disposing of the case in the district court), followed by *United States v. Ryan*, 806 F.3d at 692 n.1.

Third, the government hypothesizes that a defendant may lose the right to cross-appeal if the government appeals the initial sentence without signaling an intent to appeal restitution. The same rules apply to the defendant as apply to the government. If the defendant seeks only to defend the restitution award, he may do so without filing a cross-appeal. *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473, 479 (1999) ("Absent a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record.") (internal quotation omitted). If the defendant intends to cross-appeal, and has not earlier filed a notice of appeal, he may file a timely notice after the amended judgment is

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[4] The government may file a protective notice of appeal, deciding later whether to pursue its appeal. *See* 18 U.S.C. §3742(b); *Greenlaw*, 554 U.S. at 245-46.

entered. *See Gonzalez*, 792 F.3d at 237, and *Ryan*, 806 F.3d at 692 n.1.

C. An irregularity under Fed. R. App. P. 4(b)(2) is governed by the substantial-prejudice test of Fed. R. Crim. P. 52(a).

The government argues that Petitioner did not file a notice of appeal, a prerequisite to appellate jurisdiction. But that is incorrect. Petitioner did file a notice of appeal. And it was certainly timely as to the conviction and part of the sentence. So it timely invoked the Court of Appeals' jurisdiction. The alleged irregularity is that the timely notice was too early as to another aspect of the sentence in the same case. It was both timely and early at the same time. The MVRA allows this possibility, just as the provisional sentencing law did in *Corey* and *Behrens*. The question is whether the too-early part of the notice prevents appellate consideration of the full sentence.

The government contends that a notice of appeal that is both timely and partially too-early violates a mandatory claims-processing rule, and that violation, if invoked, requires automatic dismissal without any consideration of prejudice.

The automatic-dismissal decisions upon on which the government relies occurred in an era when irregularities were incorrectly denominated jurisdictional (1960-2005), beginning with *United States v. Robinson*, 361 U.S. 220 (1960). The government concedes, as it must, that those jurisdictionally-based automatic-dismissal decisions have been repudiated by the Court.

Br. 36 n.10; *see Kontrick v. Ryan*, 540 U.S. 443 (2004); *Eberhart v. United States*, 546 U.S. 12 (2005); and *Bowles v. Russell*, 551 U.S. 205.

Lemke v. United States, 346 U.S. 325 (1953) was decided prior to the repudiated jurisdictional-era. Rejecting a jurisdictional approach, it applied Fed. R. Crim. P. 52(a) to a too-early notice of appeal. *Lemke*'s holding was incorporated into the appellate rules governing criminal cases and was eventually incorporated into the civil appellate rules. *Lemke*'s holding and rationale continue to apply.

The government seeks to circumvent *Lemke* by speculating that if jurisdiction-era cases and *Lemke* were decided anew they would be decided in non-jurisdictional terms: If the government had objected in *Lemke*, the premature notice of appeal would have been automatically dismissed due to violation of a mandatory claims-processing rule.

That is quite a speculative leap, unsupported by the Rules and Court's precedents. The lack of an objection had nothing to do with *Lemke*'s holding; its application of the prejudice test would have resulted in the same outcome whether there had been a government objection or not. After *Lemke*'s holding became part of the appellate rules, its prejudice test was reiterated in *FirsTier*. Although the government cites and relies on *Griggs v. Provident Consumer Disc. Co.*, 458 U.S. 56 (1982), Br. 35-36, that decision's rejection of a prejudice test for premature notices of appeal in civil cases was abrogated by a rules amendment, which applied

Lemke's rule to civil appeals. *See* Fed. R. App. P. 4(a)(2) & (4), advisory committee's note (1993 amendment) (noting new rule eliminates the *Griggs* "trap for the unsuspecting litigant," who "fail[s] to file a second notice of appeal").

The Court's post-*Lemke* precedents have consistently reiterated that if a too-early notice "do[es] not prejudice the appellee," the "technical defect of prematurity . should not be allowed to extinguish an otherwise proper appeal." *FirsTier*, 498 U.S. at 651. "[I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) (citing *Houstan v. Lack*, 487 U.S. 266 (1988) (finding prisoner's imperfect delivery of notice of appeal constitutes "filing" under Fed. R. App. P. 3 and 4)). These precedents support a prejudice test, not the government's revisionist conclusion requiring automatic dismissal of a partially too-early notice of appeal.

The decisions relied on by the government are inapt because they did not involve early notices of appeal or the need to file a second notice of appeal. *Robinson* – the original of the jurisdiction-era cases – involved a late notice of appeal, not one that was partially timely and partially early. Nor did it address the failure to file a second notice of appeal. *Torres*' holding regarding civil appeals did not involve temporal limits at all, or

the failure to file a second notice of appeal, but rather addressed the failure to name a party in the notice.

Despite *Lemke*'s explicit application of Rule 52(a) to a premature notice of appeal, the government contends the rule applies only to court errors. Rule 52(a) contains no such limitation. *Musacchio v. United States*, 136 S. Ct. 709 (2016), on which the government relies, addressed Rule 52(b) (plain error), not Rule 52(a) (harmless error). Subsection (b) does relate to error "not brought to the court's attention." But subsection (a) has no such textual limitation. Rule 52(a) relates to "[a]ny error, defect, irregularity, or variance that does not affect substantial rights," and is silent about whether it may be by a party or the court. And, Rule 52(a)'s prejudice test has been applied to party pleadings, such as irregularities in an indictment. *See, e.g.*, *United States v. Stevenson*, ___ F.3d ___, 2016 WL 4191134 at *11 (3d Cir. Aug. 9, 2016) (applying Rule 52(a)'s harmless error test to error in indictment); *United States v. Dentler*, 492 F.3d 306, 310 (5th Cir. 2007) (same).

Consistent with *Lemke* and *FirsTier*, as well as *Corey* and *Behrens*, if a notice of appeal is filed both timely and too-early, as may occur with provisional sentences, that irregularity does not warrant dismissal without a consideration of prejudice. Here, of course, the government has alleged no prejudice at all. Far from being blindsided, the government devoted over seven pages of its brief in the Court of Appeals to defending the merits of the restitution sentence. Gov't CA Br. 25-32.

Applying Rule 52(a)'s prejudice test to a notice of appeal that is both partially timely – and partially too-early – does not swallow the whole of mandatory claims-processing rules. Rather, it recognizes that no meaningful foul occurs in those limited instances where a statute permits multiple steps to complete the sentencing process. Such timely/early notices satisfy the purposes served by claims-processing rules: The Court of Appeals' jurisdiction is invoked before the time for appeal expires; jurisdiction remains extant when the too-early portion of the notice would mature under the rules; and docketing and case management proceed as the rules require. The proceedings in this case, and the many others cited by both parties, prove this with certainty.

CONCLUSION

The judgment should be reversed and remanded.

Respectfully submitted,

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